



Order 97-2-28

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Served: March 4, 1997

Issued by the Department of Transportation
on the 26th day of February, 1997

Applications of :
:
RIO AIR EXPRESS, S.A. d/b/a : DOCKET OST 95-921
SKYJET BRASIL :
:
for renewal and amendment of its :
exemption under 49 U.S.C. section 40109 :

ORDER RENEWING AND AMENDING EXEMPTION

SUMMARY

By this order, we grant Rio Air Express, S.A., d/b/a Skyjet Brasil's (Skyjet) requests to: (a) renew its existing Department exemption to conduct charter foreign air transportation of persons, property and mail between a point or points in Brazil and a point or points in the United States; and (b) amend that authority in order for Skyjet to conduct Fifth Freedom charters, subject to the prior-approval provisions of the Department's charter regulations (14 CFR Part 212.)

APPLICATION

On June 5, 1996, Skyjet requested amendment of its existing exemption, which authorizes it to conduct Brazil-U.S. charters, to add underlying authority to conduct Fifth Freedom charters, subject to prior Department approval under 14 CFR Part 212. In support, Skyjet stated that it had requested separate Department authority to conduct Fifth Freedom subservice flights on behalf of Aerovias Nacionales de Colombia, S.A. (AVIANCA), in the Bogota, Colombia-New York, New York, market during June 15-August 30, 1996, and that that request was pending.¹

RESPONSIVE PLEADING

On June 21, 1996, American Airlines, Inc., filed an answer in opposition to Skyjet's June 5 request and stated that the U.S.-Brazil Air Transport Agreement does not authorize Fifth Freedom charters, and that the balance of benefits exchanged between the United States and Brazil does not encompass the unlimited Fifth Freedom authority sought by Skyjet.

¹ On June 4, 1996, Skyjet requested a Department statement of authorization to conduct the flights noted above on behalf of AVIANCA. However, Skyjet withdrew that request on June 12, 1996.

SUBSEQUENT APPLICATION

On September 30, 1996, Skyjet requested renewal of its existing exemption, which was effective through the one-year period ending October 5, 1996,² and requested that the authority be effective for two years. Further, Skyjet requested that its exemption be amended as noted above. The September 30 submission was served on American and other U.S. carriers served with Skyjet's June 5 request.

No answers were filed to Skyjet's September 30 request.

DECISION

We have decided to: (1) renew Skyjet's exemption, as amended, for one year; (2) amend Skyjet's existing exemption in order for it to conduct Fifth Freedom operations, subject to our charter regulations (14 CFR Part 212); and (3) dismiss the balance of Skyjet's request (i.e., for a duration longer than one year.) We find that our action is consistent with the public interest and with Department policy.³

In deciding to renew Skyjet's authority to conduct Brazil-U.S. charters for an additional one-year period, we find, as we did in granting the carrier's previous authority in Order 95-12-7, that the proposed operations are encompassed by the U.S.-Brazil Air Transport Agreement, and that the carrier remains operationally and financially qualified to conduct its proposed services.

While our action here also adds authority for Skyjet to conduct Fifth Freedom charters, subject to our prior approval, that action, while expanding the scope of Skyjet's exemption, does not provide broad new rights to the carrier. Rather, it merely provides Skyjet with the same underlying charter authority held by other Brazilian carriers.⁴ This Fifth Freedom charter authority, however, can be exercised only after the provisions of the Department's regulations are satisfied. Specifically, under 14 CFR section 212.4(b)(1), Skyjet is required to request Department authority, in the form of a statement of authorization, prior to the operation of even a single Fifth Freedom flight. We will therefore be in a position to determine, on a case-by-case basis, and after the opportunity for comment by interested parties, whether Fifth Freedom charters proposed by Skyjet meet the public interest criteria of Part 212.

In view of the above, we find that grant of the authority described here is consistent with the public interest and that our action does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

² See Order 95-12-7. Skyjet invoked the automatic extension provisions of federal law (5 U.S.C. section 558(c) as implemented by 14 CFR Part 377) to maintain its exemption in effect.

³ Our dismissal is without prejudice to Skyjet's refiling at a later date, should future circumstances warrant.

⁴ See, for example, Department authorities granted to the following Brazilian carriers: (1) ABSA-Aerolinhas Brasileiras, S.A., by Notice of Action Taken November 21, 1996, in Docket OST-96-1372; (2) Bay Air Cargo, S.A., by Notice of Action Taken June 27, 1996, in Docket OST-96-1419; and (3) Varig, S.A., and Transbrasil S.A. Linhas Aereas, in Order 91-5-27.

ACCORDINGLY,

1. We grant Rio Air Express, S.A., d/b/a Skyjet Brasil an amended exemption from the provisions of 49 U.S.C. section 41301, to conduct charter foreign air transportation of persons, property and mail between a point or points in Brazil and a point or points in the United States, and other charters, in accordance with the Department's regulations (14 CFR Part 212);

2. This authority is effective on the issue date of this order, and shall terminate one year from that date;

3. To the extent not granted, we dismiss Skyjet's requests of June 5 and September 30, 1996, in this Docket;

4. The authority granted above is subject to the terms, limitations and conditions of Order 95-12-7 and to the attached standard exemption conditions;

5. We may amend, modify or revoke this authority at any time and without hearing; and

6. We will serve a copy of this order on Skyjet, American, the Ambassador of Brazil in Washington, D.C., the Department of State (Office of Aviation) and the Federal Aviation Administration (AFS-200).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

(1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;

(2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;

- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Department's Regulatory Analysis Division, X-57, Office of Aviation Analysis (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:
 - (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or
 - (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).